BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petition of Adolph Netzel for a Writ of Certiorari presents to this Court a case unique in its every detail. A case of a man who places his reputation above that of mere monetary considerations (R. 19), through the combination of the indiscretions of youth and the hey-day of the fiasco of the National Prohibition Act, the petitioner was incarcerated for a Federal misdemeanor, this he admitted (R. 11). Until convicted in the proceedings here sought to be reviewed, his name and reputation were above reproach. It is for the perpetuation and protection of his integrity that this application for Writ of Certiorari is sought.

> "If the accused is in danger of being subjected to infamous punishment, the crime is deemed to be infamous, although infamous punishment may not be actually inflicted." *Ex Parte Wilson,* 115 U. S. 417, 5 Sup. Ct. 935, 938, 29 L. Ed. 89.

The sentence imposed in a given case is not the sole criterion as to the grade of the offense committed. 14 Am. Jur., Page 763.

First Question.

The first question and the one on which the Honorable Michigan Supreme Court divided, comes squarely under the provisions of the 14th Amendment, U. S. Constitution. If the defendant before the bar of justice on a rape charge is entitled to the benefit of the court's charge of lesser and included offenses, and the defendant before the same bar of justice on a charge of felonious assault be not entitled to the benefit of a charge of lesser and included offenses,

clearly such rule is violative of the equal protection clause of the Federal Constitution. This cannot be more forcefully set forth than by the statement in Mr. Justice Butzel's minority opinion:

> "Defendant was denied the protection the statute accords" (R. 30).
>
> "Equal protection to all is the basic principle upon which rests justice under the law." U. S. Const. Amend. XIV. *Pierre* v. *State of Louisiana,* 59 S. Ct. 536, 306 U. S. 354, 83 L. Ed. 757.
>
> "The fourteenth Amendment is intended as a limitation upon the power of the Government in its dealings with the citizen, and relates to that class of rights *whose protection is peculiarly with the province of the judicial branch of the Government.*" *U. S.* v. *Lee,* 1 S. Ct. 240, 106 U. S. 196, 27 L. Ed. 171.
>
> "Due process of law implies equal protection of the laws." *Sims* v. *Rives,* 84 F. (2d) 871.
>
> "All people must stand on an equality before the bar of justice in every *American Court.*" U. S. Const. Amend. 14. *Chambers* v. *State of Florida,* 60 Sup. Ct. 472, 309 U. S. 227.

Second Question.

Petitioner was denied his day in court and right to a fair trial by the court's refusal of an opportunity to explain a prior arrest touched upon by the prosecution in cross-examination. This was grievous error. "Where the accused makes a general offer of proof to explain a particular matter, it is error to exclude such proof, although the Court has properly excluded a particular question on the subject before the offer of proof is made." *Commonwealth* v. *Goldberg,* 98 N. E. 692, 21 Mass. 88. "The 5th and 6th Amendments, U. S. Const., guarantee to every accused the right to cross-examine on material facts every witness who testifies against him." *U. S.* v. *Keown,* 19 Fed. Supp. 639.

It cannot be said that the petitioner did not realize the harm done his cause and make prompt request for rectification (R. 13). The ruling of the Trial Court on this matter so shocks the mind and conscience as to leave the impression on one whose legal knowledge and training be ever so superficial, that ulterior motives hovered in the background.

In *Snyder* v. *Mass.*, Justice Roberts (dissenting) said:

> "Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry *certain fundamental rules of fairness be observed;* forbids the disregard of these rules, and is not satisfied, if, though the hearing is unfair, the result is just." 54 S. Ct. 330, 291 U. S. 97.
>
> "Due process of law requires that every man shall have the protection of his day in Court and the benefit of the general law, which hears before it condemns, and proceeds not arbitrarily but upon inquiry, and renders judgment only after trial." *Truax* v. *Corrigan,* 42 S. Ct. 124, 257 U. S. 312. *Own Bey* v. *Morgan,* 41 S. Ct. 433, 256 U. S. 94.
>
> "Evidence which shows the commission of other offenses should be received with the utmost care and caution, because of its prejudicial and damaging character." *Crow* v. *State,* 183 So. 897, 28 Ala. App. 319; *People* v. *Folignos,* 153 N. E. 373.
>
> "Evidence that accused has committed another crime independent of and unconnected with the one on trial is inadmissable." C. J. S. 22-682.
>
> "The rule extends to proof of an accusation of another crime as well as to evidence of its actual commission." *U. S.* v. *Fabacher,* C. C. A. La., 20 F. (2d) 736.
>
> To proof of a threat, *People* v. *Pollock,* 89 P. 2d 128, or intention. *Ball* v. *State* (Tex.), 39 S. W. 2d 619.
>
> "Evidence of a distinct and separate offense which is not in any way connected with the case on trial or which does not afford a logical inference of design or

intent to commit the crime charged is not admissable in a prosecution for assault, aggravated assault or assault and battery." 22 C. J. S. 691C.

Burum v. *U. S.*, 56 F. (2d) 301;
Logan v. *U. S.*, 52 Sup. Ct. 459;
Howe v. *U. S.*, 56 F. (2d) 305;
Crowley v. *U. S.*, 8 F. (2d) 118;
Baish v. *U. S.*, 9 F. (2d) 988;
Gordon v. *U. S.*, 254 F. (2d) 53;
U. S. v. *Sebo*, 101 F. (2d) 889;
Neff v. *U. S.*, 105 F. (2d) 688.

In *Melarango* v. *U. S.*, 88 F. (2d) 264, it was said:

> "We accordingly hold that it was error to admit evidence of the Defendant's prior conviction of a crime which was not a felony or a misdemeanor in the nature of a crimen falsi or involving moral turpitude."

It was error to admit the evidence of petitioner's prior arrests but the Trial Court's subsequent refusal to allow explanation of the arrest is such a glaring episode of judicial indiscretion as to admit of no justification either in law, logic or common sense. The Michigan law is well settled on this point. *Driscoll* v. *People*, 47 Mich. 417, 11 N. W. 223; *Wilbur* v. *Flood*, 16 Mich. 40; *Clemens* v. *Conrad*, 19 Mich. 170; *Hamilton* v. *People*, 29 Mich. 173.

> "But it would be grossly unjust to refuse the witness the benefit of any explanation that may affect the inferences that might otherwise be drawn from a criminal arrest. Such an arrest is no evidence of crime, but is nevertheless more or less calculated unexplained to prejudice the credit of the witness who admits it, and it was entirely proper to allow the circumstances to be shown, and let it appear that the only responsible complainant did not mean to accuse the witness." *Driscoll* v. *People, supra.*

Respectfully submitted,

ODIN H. JOHNSON,
Attorney for Petitioner.

(4128)

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MAY 27 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1028

ADOLPH NETZEL,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN.

ANSWER TO PETITION OF ADOLPH NETZEL FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN.

HERBERT J. RUSHTON,
Attorney General;
EDMUND E. SHEPHERD,
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CHARLES L. WILSON,
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Oakland County, Michigan;
DON C. NOGGLE,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the People of the State of Michigan by Herbert J. Rushton, Attorney General; Edmund E. Shepherd, Solicitor General; Charles L. Wilson, Prosecuting Attorney, Oakland County, Michigan; Don C. Noggle, Chief Assistant Prosecuting Attorney and Luther Harvey Lodge, Assistant Prosecuting Attorney, and present as Answer to the Peti-

tion in the above entitled cause the following as their reasons for a denial of the said Petition:

Facts.

The record on appeal to the Supreme Court of Michigan discloses the following facts pertinent to a decision by this Court as to whether or not certiorari should issue:

During the night time of the morning of January 21st, 1939 Adolph Netzel, the owner of a used automobile parts or junk yard together with an employee by the name of Lawrence was patroling his place of business in anticipation of catching thieves. The complaining witness, in the case, with three companions was parked in his automobile about one block from the junk yard. Petitioner and his employee accosted the complaining witness demanding his identity and during the conversation his employee displayed an automatic pistol by way of intimidation. Complainant started his car, told his companions to crouch down and headed for the Pontiac Police Station, approximately two miles distant. Petitioner followed in hot pursuit and instructed his employee to fire at Complainant's car, which was preceding them (R. 28). Upon arrival at the police station of both vehicles Pontiac police arrested both petitioner and his employee and at that time took from Petitioner, Netzel, a rifle and from the car the pistol, previously fired by the employee during the chase (R. 32). Neither petitioner nor his employee had a permit to carry a gun nor were deputized to make arrests. The Trial Court instructed the Jury that it could bring in one of two verdicts, namely, (a) guilty as charged, or (b) not guilty (R. 25 and R. 32).

ARGUMENT.

Petitioner places his chief reliance on two points:

First: The failure of the Trial Court to instruct the Jury that it might find the accused guilty of inferior included crimes or misdemeanors;

Second: The refusal of the Trial Court to allow the Defendant to explain to the jury prior arrests without conviction, touched upon by the prosecution in cross examination.

The people will discuss these two points in order:

First: "Did the failure of the Trial Court to instruct the Jury that it could find the accused guilty of inferior included crimes or misdemeanor constitute reversible error?" The pertinent part of Section 1, Article 14 of the Constitution reads as follows:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

There was no room within the four corners of the testimony for the Jury to do other than as instructed by the Trial Court and this question was so ably covered by Mr. Justice North in the Michigan Supreme Court's opinion that we quote the pertinent portion of the opinion as follows:

> "But in the instant case if an assault was committed at all, the additional element of being armed at the time with a dangerous weapon was freely admitted by Defendant who took the witness stand in his own behalf. As to this element of the offense charged in the instant case there was no issue for the Jury, because the Defendant testified, 'I was in possession of these fire-

> arms on the night or on the morning of January 21st. They were in my car. The rifle I was pointing out of the car window. Mr. Lawrence had possession of this automatic pistol.' Under the above testimony given by Defendant, if he committed any assault in violation of law, he committed it while armed with a dangerous weapon; and the Trial Court was not in error in instructing the Jury: 'There are only two possible verdicts, one of guilty as charged, the other not guilty' " (R. 32).

It seems clear to the People that in view of the testimony of Mr. Netzel and as ruled on by the Michigan Supreme Court there was no error in not only declining to instruct on the lesser included offenses but in specifically excluding them. *People* v. *Repke,* 103 Mich. 459, *People* v. *Fuhrmann,* 103 Mich. 593, *People* v. *Nunn,* 120 Mich. 530, *People* v. *Allie,* 216 Mich. 133, *Sparf and Hansen* v. *U. S.,* 156 U. S. 51, 103, *People* v. *Janes,* 273 Mich. 430, 3rd. Compiled Laws of Mich., 1929, page 17322.

The second point relied upon by Petitioner, namely, "The refusal of the Trial Court to allow the defendant to explain to the Jury prior arrests without conviction, touched upon by the prosecution in cross examination," hardly needs discussion in this Answer. The first question was the only one passed on by the Michigan Supreme Court in disposing of the appeal and with reference to this second question Justice Butzel in writing the dissenting opinion said,

> "Other claims of error need not be discussed, those that have a semblance of merit will not occur on a new trial."

Justices Chandler and Wiest concurred with Butzel in this statement in the minority opinion (R. 30). Justice North, who wrote the majority opinion stated,

> "I agree with Mr. Justice Butzel that the other alleged errors are without merit and would not justify reversal. The conviction and sentence are affirmed."

Justices Bushnell, Sharp and McAllister concurred with North (R. 33). In other words, all seven Justices, (the late Justice Potter not sitting) concurred that there was no merit in any of the other contentions of Petitioner, which contentions are here urged as a basis for the issuance of a writ of certiorari.

There is another and more potent reason why this Court should deny Petitioner's application. Michigan's statute defining felonious assault reads as follows:

> "Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon but without intending to commit the crime of murder, and without intending to do great bodily harm less than the crime of murder, shall be guilty of a felony." Sec. 82, Act 328, P. A. 1931.

The Michigan Supreme Court has placed its interpretation upon this statute and the Federal courts are bound by the Michigan decisions. *Erie R. R.* v. *Tompkins,* 304 U. S. 64, *Dimmick* v. *U. S.* 135 Federal 257, *Grunberg* v. *U. S.,* 145 Federal 81, *Holt* v. *U. S.,* 94 Federal 2nd, 90, *Tubbs* v. *U. S.,* 105 Federal 59, *Metzler* v. *U. S.,* 64 Federal 2nd 203, *U. S.* v. *Rosenstein,* 34 Federal 2nd 630, *Quigley* v. *U. S.,* 19 Federal 2nd 756, *Barnes* v. *U. S.,* 8 Federal 2nd 832.

All of the points raised by petitioner in this application for certiorari were urged and relied upon in his appeal to the Supreme Court of Michigan and reference is made to the Michigan Supreme Court opinion in the case of the People v. Netzel, 295 Mich. pages 353 to 360 inclusive.

The petition for writ of certiorari should be denied.

Respectfully submitted,

PEOPLE OF THE STATE OF MICHIGAN,
By HERBERT J. RUSHTON,
Attorney General;
EDMUND E. SHEPHERD,
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Dated: May 19th, 1941.

(4476)